DOCKET FILE COPY ORIGINAL

ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of:	)	
	)	
Implementation of Sections 11 and 13	)	
of the Cable Television Consumer	)	MM Docket No. 92-264
Protection and Competition Act of 1992	)	
	)	
Horizontal and Vertical Ownership	)	
Limits, Cross-Ownership Limitations	)	
and Anti-Trafficking Provisions	)	

To: The Commission

COMMENTS OF VIACOM INTERNATIONAL INC.

VIACOM INTERNATIONAL INC.

Richard E. Wiley
Lawrence W. Secrest, III
Philip V. Permut
Wayne D. Johnsen
of
WILEY, REIN & FIELDING
1776 K Street, N.W.
Washington, D.C. 20006
(202) 429-7000

Its Attorneys

February 9, 1993

TABLE OF CONTENTS

Page

Table of Contents i

Summary iii

I. Channel Occupancy Limits 2

A. The Channel Occupancy Limits Should Not Apply to Any Program Service That is Carried by Non-Affiliated Cable Operators on a Widespread Basis . 4

B. The Channel Occupancy Limits Should be Applied Only to Video Programmers Under Common Ownership With the Cable Operator 6

C. The Commission Should Not Require Cable Systems To Delete Any Program Service Currently Carried 9

D. Any Limits Adopted by the Commission Should Apply Only to National Program Services 11

E. The Channel Occupancy Limits Should Be Set In the Least Restrictive Manner Necessary To Achieve the Goals of Congress 13

1. All activated channels should be considered in determining appropriate limits 14

2. Any cable system with an activated channel capacity in excess of 54 channels should not be subject to the channel occupancy limits at all 15

3. Any cable system with an activated channel capacity of 54 or fewer channels may not devote more than 50% of its activated channel capacity to commonly-owned non-exempt national program services 16

F. The Channel Occupancy Limits Should Be Phased Out in Communities in Which Effective Competition Exists 17

Page

G. Cable Operators Should Certify Their Compliance with the Channel Occupancy Limits to the Commission as Part of Their Annual Reporting Requirement 18

II. Participation In Program Production 19

III. Sales Of Cable Systems 21

IV. Cross-Ownership Restrictions 24

V. Conclusion 25

Summary

Viacom International Inc. ("Viacom") hereby comments on the Notice of Proposed Rule Making relating to Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Cable Act").

Because the channel occupancy limits impinge on important First Amendment and other constitutional rights, the Commission, in promulgating regulations, must tread lightly to assure that the rules will afford the broadest latitude possible under the Act in the selection and carriage of programming.

Accordingly, Viacom proposes that the channel occupancy limits should not apply to any program service that the marketplace has generally found to be desired by consumers on a national basis. Specifically, any program service that: (i) is carried by cable systems not under common ownership with the programmer; and (ii) is available to more than 50% of subscribers nationwide (excluding subscribers to commonly-owned systems), should not be counted toward the channel occupancy limits.

Viacom also supports the Commission's tentative conclusion that the channel occupancy limits should be applied only to program services under common ownership with the cable operator. In this way, cable operators will not be discouraged from furthering their important contribution to program diversity through investment in new program services. In view of Congressional and Commission recognition of the importance of

this contribution, Viacom proposes that new program services should be exempt from the channel occupancy limits for a period of at least five years.

Viacom also supports the determination to grandfather the carriage of any vertically-integrated program service currently provided by a cable system. Moreover, to encourage cable operators to supply more local programming, the limits should apply only to national program services.

Viacom proposes that the occupancy limits be based on the total number of activated channels on the cable system. Viacom supports the use of a channel capacity threshold in which any cable system exceeding the threshold would not be subject to the channel occupancy limits. In order to encourage the development and implementation of new technologies, Viacom submits that the threshold be set at 54 channels. Systems with 54 channels or less would be permitted to devote no more than 50% of their activated channel capacity to commonly-owned, national program services which are subject to the channel occupancy limits.

Viacom also supports phasing out the channel occupancy limits in communities in which effective competition has developed and agrees that there is no need to limit the ability of multichannel video program distributors to participate in the production of programming at this time.

With regard to sales of cable systems, a sale of more than one system (or the sale of an integrated system) should be considered to be in compliance with the anti-trafficking

provision as long as no more than 50% of the homes passed by the systems to be sold were acquired or built within the three-year holding period.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of:	)	
	)	
Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-264
	)	
Horizontal and Vertical Ownership Limits, Cross-Ownership Limitations and Anti-Trafficking Provisions	)	

To: The Commission

COMMENTS OF VIACOM INTERNATIONAL INC.

Viacom International Inc. ("Viacom"), by its attorneys, hereby offers its comments to the Notice of Proposed Rule Making and Notice of Inquiry ("NPRM") in the above-captioned proceeding. Viacom, a diversified entertainment company which owns and operates program services, cable systems and other entertainment-related businesses,[1] could be affected substantially by regulations adopted by the Commission in response to the

---

[1] Showtime Networks Inc. ("SNI"), a wholly-owned subsidiary of Viacom, owns and operates the premium program services Showtime, The Movie Channel, and FLIX. MTV Networks ("MTVN"), a division of Viacom, owns and operates the advertiser-supported program services MTV: Music Television ("MTV"), VH-1/Video Hits One ("VH-1") and Nickelodeon (comprising the Nickelodeon and Nick At Nite programming blocks ("Nick")). Viacom also owns Showtime Satellite Networks Inc. ("SSN"), which distributes SNI, MTVN and third-party program services to owners of home television receive-only ("HTVRO") earth stations nationwide. Through wholly-owned subsidiaries, Viacom also holds partnership interests in Comedy Central, Lifetime Television and All News Channel, advertiser-supported program services, and in Prime Sports Northwest, a regional sports service in the Seattle-Tacoma, Washington, area. Viacom Cable owns and operates cable systems serving approximately 1,000,000 subscribers.

ownership provisions of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (the "1992 Cable Act" or the "Act").

I. Channel Occupancy Limits

The Commission has asked for views on how to implement the channel occupancy limits prescribed in the 1992 Cable Act. As an initial matter, it is important to recognize that restricting the right of a cable operator to choose the programming it wishes to distribute raises serious First Amendment questions.[2] Because "cable television shares attributes of the traditional press,"[3] cable operators have "broad discretion to select the programming [they] offer [their] subscribers."[4] This right to decide what to say is not afforded a lesser degree of protection because a cable operator may be under common ownership with a program service it wants to carry. The rights to distribute one's own speech and to

---

[2] The fact that cable operators seek to profit from the business of speaking and distributing speech does not in any way lessen their First Amendment rights. As the Supreme Court has said, "the degree of First Amendment protection is not diminished merely because the . . . speech is sold rather than given away." City of Lakewood v. Plain Dealer Pub. Co., 108 S.Ct. 2138, 2143 n. 5 (1988).

[3] Quincy Cable TV, Inc. v. F.C.C., 768 F.2d 1434, 1450 (1985).

[4] Id. at 1452, citing Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974).

disseminate the messages of others are both protected by the First Amendment.[5]

The important First Amendment interests affected by the channel occupancy limits thus counsel caution on the part of the Commission in adopting implementing regulations. Of course, attention to First Amendment values is an important part of the analysis of any Commission regulation.[6] In this case, however, the agency should give particularly careful consideration to such values because other provisions of the 1992 Cable Act already restrict a cable operator's First Amendment choices by creating an affirmative obligation to carry the speech of others. See 47 U.S.C. §§ 532 (commercial leased access requirements), 534 (commercial must-carry requirements), 535 (non-commercial must-carry requirements). Limits on channel occupancy even more egregiously "impinge on editorial discretion" and "prevent cable programmers from reaching their intended audience"[7] by restricting the vertically-integrated cable operator's capacity to disseminate its own speech. Therefore, in interpreting and

---

[5] See Lovell v. City of Griffin, 303 U.S. 444, 452 (1938) ("Liberty of circulating is as essential to [the freedom of speech] as liberty of publishing; indeed without the circulation, the publication would be of little value." (quoting Ex Parte Jackson, 96 U.S. 727, 733 (1877)).

[6] "[I]n an analysis of any Commission regulation, it is well established that First Amendment considerations are an integral component of the public interest standard." Syracuse Peace Council, 2 FCC Rcd 5043, 5046 (1987).

[7] Quincy, 768 F.2d at 1453.

implementing the Act, the FCC must tread lightly to assure that its rules will afford cable operators the broadest latitude possible under the Act to select and carry programming of their own choosing.[8]

A. The Channel Occupancy Limits Should Not Apply to Any Program Service That is Carried by Non-Affiliated Cable Operators on a Widespread Basis

The Commission recognizes that the purpose of the channel occupancy provision is to "reduce the incentive and ability of cable operators to favor their affiliated programming services to the disadvantage of unaffiliated programmers." NPRM at ¶43. As the Commission acknowledges, however, the 1992 Cable Act does not provide clear guidance regarding the procedures that should be used in calculating these limits. Id. at ¶47. As with other restrictions placed by the Act on vertically-integrated cable operators, the channel occupancy limits are designed to prevent a cable operator from using its local market power to the detriment of other program services seeking entry into the marketplace. See Senate Committee on Commerce, Science and Transportation, S.

---

[8] The Commission must also consider other constitutional rights that are implicated by the channel occupancy limits. For example, the limits may constitute a "taking" of property that, under the Fifth Amendment, would be unlawful in the absence of just compensation. See, e.g., PruneYard Shopping Center v. Robins, 447 U.S. 74, 82 (1980); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 434-35 (1982). In this respect, the limits are similar to an easement on the cable operator's property for the exclusive benefit of strangers (here, the owners of unaffiliated program services).

Rep. No. 102-92, 102d Cong., 1st Sess. (1991) ("Senate Report") at 32.

By the same token, however, a vertically-integrated cable operator should not be precluded from carrying a popular program service merely because they are under common ownership. Indeed, the Commission has been directed to consider consumer interest in fashioning channel occupancy limitations. Senate Report at 27. Denying consumers the ability to view desired programming merely because those consumers happen to be served by a vertically-integrated cable operator clearly runs counter to the public interest. Thus, any numerical limitation which is adopted must be flexible and responsive to consumer preferences. Consequently, in those instances where a vertically-integrated entity exceeds the channel occupancy limit, the Commission should look to the marketplace to determine whether the carriage of a commonly-owned program service is reasonably reflective of consumer interest or an attempt by the cable operator to impermissibly disadvantage a non-affiliated entity.

Widespread carriage of a program service by non-affiliated cable systems is an objective indication that carriage of the same service by an affiliated cable operator does not constitute discrimination. Rather, such widespread carriage reflects the fact that the service is highly valued by the marketplace. Accordingly, Viacom submits that the Commission should utilize an objective marketplace measure to assure that any program service

that has achieved a sufficiently high level of carriage by non-affiliated cable operators will not be counted toward any channel occupancy limitations imposed on a vertically-integrated cable operator. Specifically, Viacom proposes that carriage of a program service by cable systems not under common ownership with the programmer that serve more than 50% of cable subscribers nationwide (excluding cable subscribers to such commonly-owned systems) should not be counted toward the channel occupancy limits. This test will further the policy of the 1992 Cable Act to "rely on the marketplace, to the maximum extent feasible,[9] while ensuring that subscribers to a vertically-integrated cable system will not be deprived of a service that is considered, on a national basis, to be desirable.

B. The Channel Occupancy Limits Should be Applied Only to Video Programmers Under Common Ownership With the Cable Operator

The Commission tentatively has concluded that the channel occupancy limits should be applied "only to video programmers affiliated with the particular cable operator." NPRM at ¶50. Viacom fully supports this conclusion.

The objective of the channel occupancy limitation is to ensure "competitive dealings between programmers and cable operators and between programmers and competing video distributors." Senate Report at 27. The Commission's focus on

---

[9] 1992 Cable Act, § 2(b)(2).

programmers affiliated with a particular cable operator will achieve this objective by reducing the ability and the incentive of a cable operator to impermissibly discriminate in favor of a commonly-owned program service[10] without unduly restricting the ability of the cable operator to choose other programming for its subscribers.

The Commission's proposal recognizes that a cable operator has no incentive to discriminate in favor of a program service affiliated with another cable operator.[11] Rather, in the case of all program services not affiliated with the particular cable operator in question, the operator has an unambiguous incentive to choose the program services which will attract the most subscribers to its system. Commission regulations should not restrict this choice.

Moreover, both Congress and the Commission have found that the cable industry has played an important role in increasing program diversity through its investment in and support of new program services. NPRM at ¶ 44; House Committee on Energy and Commerce, H.R. Rep. No. 102-628, 102d Cong., 2d Sess. (1992) ("House Report") at 41. Because of the active participation of

---

[10] NPRM at ¶ 50.

[11] Indeed, as the Commission notes, there is scant evidence, if any, that cable operators have ever favored services with which they are affiliated over unaffiliated program services. See NPRM at ¶44; see also House Report at 41. There is absolutely no evidence that a cable operator has favored a program service merely because it is affiliated with another cable operator.

cable operators in the creation of new and diverse program services, many of these services are now under common ownership with cable operators. If the channel occupancy limitation is read to encompass every vertically-integrated program service whether or not under common ownership with the cable system in question, it is likely that many systems, even those without an interest in any program service, will already be deemed to have reached their "quota" of vertically-integrated programming. Accordingly, to expand the reach of the channel occupancy limits to include a program service in which any cable operator has an attributable interest would effectively foreclose cable operators from participating in the creation of new services because they would be unable to obtain the penetration necessary to sustain a program service. The Commission's proposal, however, will allow cable operators to continue their involvement in creating and fostering new program services with the knowledge that such services may be freely carried by non-affiliated cable systems.

Indeed, the role of cable operator investment and support has historically been so important to increasing program diversity that Viacom submits that carriage of a new program service in which the cable operator has an attributable interest should be exempt from any channel occupancy limits ultimately adopted. This will encourage cable operators to create and support new services, in furtherance of the statutory objective

to increase program diversity.[12] Viacom submits that the exemption for new services should last for a minimum of 5 years, as its experience has shown that at least this amount of time is needed for most new program services to be fully established in the national marketplace.[13]

C. The Commission Should Not Require Cable Systems To Delete Any Program Service Currently Carried

The Commission also has tentatively determined to grandfather the carriage of any vertically-integrated program service. NPRM at ¶55. Thus, no cable system would be required to delete a commonly-owned program service even if the number of such services currently carried exceeds the channel occupancy limits ultimately adopted. Viacom fully supports this

---

[12] See 1992 Cable Act, § 2(b)(1). Additionally, Section 12 of the 1992 Cable Act prohibits a cable operator from requiring a financial interest in a program service as a condition of carriage. Thus, the Commission can be assured that a cable operator's investment in a new program service is a bona fide attempt to increase diversity in the program marketplace.

[13] Viacom also supports allowing cable operators to enter into exclusive distribution agreements with new program services of up to 10 years. Comments of Viacom International Inc. in MM Docket No. 92-265, at 36-37. Viacom believes that exclusive distribution arrangements will induce cable operators to carry untested program services and undertake marketing to increase the viability of such services. The 10 year arrangement would serve to induce and reward cable operators who have assumed the risks inherent in dedicating channel capacity to and promoting new services. The 5 year limitation urged here, on the other hand, is intended to give the program service an initial subscriber base while allowing sufficient time to achieve significant national penetration.

determination. As the Commission has found, divestiture or deletion is neither required by the Act nor in the public interest. Id.

In addition to disrupting service to subscribers,[14] deletion of program services would disrupt existing financial arrangements entered into in reliance on continued carriage of those services. For example, many advertiser-supported program services have existing commitments to advertisers based on the expected audience they will be able to deliver. These determinations are, in turn, based on the number of subscribers in cable systems that have signed affiliation agreements with the program service. Forced reduction in the number of subscribers available would result in costly make-goods and could ultimately undermine the financial viability of the program service.

Similarly, deletion of program services would interfere with the ability of a program service to honor contracts with program suppliers. Program services have entered into long-term agreements with program suppliers in reliance on the extent of distribution expected under existing affiliation agreements with cable systems. By requiring the termination of an existing agreement, the Commission would undermine the very basis of these

---

[14] The forced removal of an existing program service would also be an egregious First Amendment violation.

financial commitments.[15] Accordingly, Viacom agrees that it is sound public policy to grandfather existing carriage of vertically-integrated program services.

D. Any Limits Adopted by the Commission Should Apply Only to National Program Services

The Commission also asks whether "channel occupancy limits apply only to vertically-integrated national programming networks, or whether such limits should also apply to vertically-integrated regional programming networks." NPRM at ¶48. Viacom submits that the limits should be applied only to national networks.

A primary goal of the Communications Act is to encourage localism. See, e.g., Senate Report at 41-42. Indeed, one of the principal rationales for the re-instituted must-carry rules and the grant of preferred speaker status to broadcasters, is to preserve the public interest benefit of local programming that traditionally has been provided by local broadcasters. Id.[16] Cable operators also recognize the importance of local

---

[15] To the extent the Commission applies the channel occupancy limits only to cable operators under common ownership with the program service, Viacom believes it would likely suffer less than other vertically-integrated industry participants because its cable operations provide only a small portion of its program services' subscriber base.

[16] Viacom's position on the must-carry provisions is set forth in its comments in MM Docket No. 92-259.

programming, and many are providing local news channels or local origination channels that provide programming designed specifically for residents of their community. Because these channels generally provide little or no revenue, and certainly less revenue than national program services, including them in the channel occupancy limitation would serve only to discourage cable operators from providing locally produced programming to their subscribers. This result runs directly counter to the Act's stated objective of ensuring the continued availability of local programming. Accordingly, the best policy to pursue is one that will encourage cable operators to provide local programming.

Regional channels similarly serve the goal of localism. Unlike broadcast stations, a cable system is often restricted to providing service to subscribers in a single community. That community, however, is generally part of a larger, fairly homogenous area.[17] As a result, a cable operator will often combine with other area operators in order to provide a service which appeals to residents of the larger region.[18] These

---

[17] For example, New York City has divided itself into several separate franchise areas. Similarly, the Washington, D.C. metropolitan area is comprised of a myriad of franchising jurisdictions. Much local programming, however, is of interest to residents of all jurisdictions in that area.

[18] This may be the result of a joint venture between area operators. Alternatively, a single operator may produce programming designed to serve the needs of residents in neighboring franchise areas as well as its own and enter into carriage agreements with other area operators who desire to provide their subscribers with that local programming.

regional networks, in effect, are able to reach the audience typically served by a television broadcaster and provide the type of "local" programming traditionally associated with broadcasters. Indeed, in many cases, they will provide more "niche" programming or programming specifically produced for residents of that area than broadcasters, which generally carry large amounts of national programming. Moreover, by combining efforts, a group of area operators will be able to produce or acquire better quality programming. Consistent with the goals of the Communications Act, the Commission should not discourage cable operators from creating these local and regional offerings. Accordingly, Viacom submits that it is appropriate to exempt such program services from any channel occupancy limits ultimately adopted.

E. The Channel Occupancy Limits Should Be Set In the Least Restrictive Manner Necessary To Achieve the Goals of Congress

The Commission seeks comment on the procedures to be used in calculating the channel occupancy limits. NPRM at ¶47. It should first be noted that the Commission has great flexibility in promulgating channel occupancy regulations. See Senate Report at 80. When fashioning these regulations, the Commission, in addition to weighing the impact of the rules on important constitutional rights, should bear in mind that the channel occupancy limits are but part of a larger Congressionally-

mandated scheme to promote competition and diversity. See Senate Report at 23. When one considers the other overlapping regulations aimed at achieving the same Congressional purposes,[19] it is apparent that there is no need for overly restrictive channel occupancy regulations.

1. All activated channels should be considered in determining appropriate limits

Because of the must-carry, PEG and leased access provisions of the 1992 Cable Act, cable operators are already required to devote a substantial portion of their channel capacity to unaffiliated program services. Since the Commission has found that these requirements result in substantial diversity to consumers and provide competition to program services affiliated with the cable operator,[20] Viacom submits that these channels should be included in the total number of channels used to calculate channel occupancy limits. Indeed, it would be perverse to require the carriage of these services in furtherance of diversity, while refusing to recognize the contribution they make to the achievement of Congress' goal.

---

[19] See, e.g., 1992 Cable Act, §§ 12, 19.

[20] NPRM at ¶ 48.

2. Any cable system with an activated channel capacity in excess of 54 channels should not be subject to the channel occupancy limits at all

Because digital compression, fiber optic cable, and other technological advances will, as a practical matter, achieve the goals sought by the channel occupancy limits, the Commission proposes to "establish a threshold beyond which the channel occupancy limits would no longer be applicable." NPRM at ¶53. Under this approach, any cable system that exceeds the channel capacity threshold will not be subject to any limits under the Act on its ability to carry commonly-owned program services. In an environment in which advances in channel capacity will ultimately allow cable operators to provide 500 or more channels of programming, cable operators, purely as a matter of business necessity, will be required to obtain programming from numerous unaffiliated programmers in order to fill these channels.

Viacom supports the Commission's approach and proposes that the channel capacity threshold be set at 54 channels. This level is appropriate because it is a realistic target for operators upgrading their systems using current technology. By setting the threshold at the level most operators would achieve today, the Commission will encourage the development of new technologies that will increase channel capacity and provide an incentive to

cable operators to speed their implementation.[21] Moreover, as set forth below, the number is sufficiently high to ensure a high level of diversity in the program marketplace.

3. Any cable system with an activated channel capacity of 54 or fewer channels may not devote more than 50% of its activated channel capacity to commonly-owned non-exempt national program services

In recognition of the fact that cable operators are required to devote a substantial portion of their activated channel capacity to unaffiliated program services, and in order to limit impingement on important constitutional rights, Viacom submits that any cable system with an activated channel capacity of 54 channels or less may not devote more than 50% of its activated channel capacity to commonly-owned,[22] non-exempt national program

---

[21] Indeed, to encourage the implementation of channel compression, Viacom submits that the limits should not apply to any increased channel capacity that results from use of that technology. For example, if a system is able to deliver three channels within the spectrum currently used to deliver one channel which is occupied by a commonly-owned program service, the two channels of added capacity should be exempt from any restrictions, regardless of the size of the system.

[22] The Commission has also sought comment on the attribution criteria that should be used to determine whether a cable operator has an interest in a program service sufficient to be subject to the channel occupancy limits. NPRM at ¶46. Although Viacom will not address those standards in detail in these comments, Viacom submits that the appropriate criteria is one that determines whether the owner has a significant degree of control to compel the entity to act against its own fundamental business interests (i.e., 50% or more voting control).

services.[23] Viacom submits that its proposal will provide ample assurance of a diverse programming marketplace.

Once a system provides more than 54 channels of programming, however, there should be no government-mandated limit at all on its ability to carry commonly-owned program services. Alternatively, cable systems with more than 54 activated channels could be permitted to devote no more than 50% of their first 54 activated channels to commonly-owned, non-exempt national program services. For any channels other than the first 54, the cable operator would be subject to no limits on the carriage of additional program services.

F. The Channel Occupancy Limits Should Be Phased Out in Communities in Which Effective Competition Exists

The Commission also asks whether the channel occupancy limits should be phased out in communities where effective competition has developed. NPRM at ¶54. Viacom submits that it would be appropriate for the limits to be removed in such situations because the vertically-integrated cable operator will, as a practical matter, be incapable of inhibiting competition by rival program services since such program services would be able to enter into carriage agreements with the competing distributor. As a result, the commonly-owned cable operator will be forced to respond in a competitive fashion. Indeed, the Senate Report

---

[23] See supra § I.A.

contemplates that the existence of effective competition will preclude cable operators from exercising the market power which serves as the rationale for the channel occupancy rules. Senate Report at 24. Thus, since the Act is predicated on the proposition that the marketplace will function properly in situations in which effective competition exists, there can be no possible justification for the channel occupancy limits to remain in effect. Indeed, retaining the limits could result in the bizarre situation in which a multi-channel program distributor not under common ownership with a program service could offer that program service to subscribers while the competing commonly-owned cable operator could not. Far from promoting competition, retaining the limit where effective competition exists would hinder the commonly-owned cable operator's ability to compete.

G. Cable Operators Should Certify Their Compliance with the Channel Occupancy Limits to the Commission as Part of Their Annual Reporting Requirement

The Commission proposes that the channel occupancy limits be enforced by an annual certification to the local franchising authority and that the local franchising authority should determine whether the certification is accurate. NPRM at ¶55. Viacom submits that this method of enforcement would be unwieldy, an administrative burden on cable operators, and, as explained below, could result in disparate treatment of similarly situated systems.

Accordingly, Viacom proposes that cable operators certify compliance to the Commission as part of their annual reporting requirement regarding ratemaking. This approach is needed because otherwise a particular MSO would need to certify to potentially hundreds of local franchising authorities, each of which could request supporting information. Moreover, each franchise authority could interpret the Commission's attribution criteria in a different manner and subject the operator to differing carriage limits for similarly situated systems (or even the same system). Thus, in order to reduce the administrative burden on the cable operator, and to ensure uniformity of results with respect to a federally-mandated policy, the certification should be made to the Commission as part of the annual reporting requirement of rates. Any challenge to a certification should be addressed to the Commission, which should then determine the validity of the complaint, thereby ensuring uniformity of results. Of course, if an operator is found to have certified falsely, the Commission would be able to impose a forfeiture or other appropriate sanctions.

II. Participation In Program Production

Section 11 of the Act requires the Commission to consider whether it would be appropriate to limit the ability of a multichannel video program distributor to participate in the production of programming. 1992 Cable Act, at §11. The